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No. 85-1278

In the Supreme Court of the United States

OCTOBER TERM, 1985

ELIAZAR HERRERA-VINEGAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court correctly exercised its discretion to dismiss petitioner's second motion to vacate his conviction pursuant to 28 U.S.C. 2255.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-3) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 25, 1985, and the petition for a writ of certiorari was filed on January 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted in 1977 of conspiring to import heroin, in violation of 21 U.S.C. 963; aiding and abetting the illegal importation of a controlled substance, in violation of 21 U.S.C. 952(a),

960(a)(1) and 18 U.S.C. 2; conspiring to possess and distribute a controlled substance, in violation of 21 U.S.C. 846; and aiding and abetting the possession of a controlled substance with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. He was sentenced to a total of 45 years in prison and fined $100,000.

1. The evidence supporting petitioner's convictions is discussed in our brief in opposition to the petition for a writ of certiorari seeking direct review of petitioner's convictions. See 78-290 Br. in Opp. 2-3. Briefly, the evidence showed that Drug Enforcement Administration agents apprehended Alfredo Alamo-Ramirez as he attempted to bring 23 pounds of heroin into Texas from Mexico. Alamo-Ramirez told the agents that he had been instructed to telephone a man known as "Charro" when he reached Chicago and then to deliver the heroin to "Charro." Alamo-Ramirez agreed to accompany the agents to Chicago and call "Charro". Petitioner answered the telephone, identified himself as "Charro," and arranged for delivery of the heroin.

The court of appeals affirmed petitioner's convictions. Petitioner then filed a petition for a writ of certiorari in which he raised for the first time his claim that he was denied a fair trial because he was not provided with an interpreter; this Court denied certiorari. *United States* v. *Herrera-Vinegas*, 573 F.2d 1308 (5th Cir.) (Table), cert. denied, 439 U.S. 964 (1978).

Approximately one year later, petitioner filed a motion to set aside his convictions pursuant to 28 U.S.C. 2255. He claimed that hearsay testimony and evidence obtained as the result of an unlawful search were improperly admitted at the trial, the trial violated his constitutional protection against double jeopardy, the evidence was insufficient to support his convictions, and he received ineffective assistance of counsel at his trial. The motion did not raise any

claim relating to the absence of an interpreter at the trial. The district court dismissed the Section 2255 motion, and petitioner did not appeal. Pet. App. 2.

2. On August 12, 1983, petitioner filed a second motion to vacate his convictions pursuant to 28 U.S.C. 2255. Petitioner again asserted a claim of ineffective assistance of counsel; he also contended that his convictions were improper because he had not received an interpreter at trial and had not been afforded an opportunity to secure witnesses in his own behalf. In addition, petitioner contended that his sentence was illegal. The district court denied the motion and dismissed the case on the ground that petitioner had not presented any excuse for his failure to include these claims in his first Section 2255 motion. Pet. App. 2.

The court of appeals reversed. 738 F.2d 435 (1984) (Table). It found that the district court had not afforded petitioner an adequate opportunity to explain his failure to raise all of his claims in his first Section 2255 motion, and it remanded the case for consideration of any explanation tendered by petitioner. Pet. App. 2.

3. On remand, the district court referred the case to a magistrate and directed the magistrate to provide petitioner with a form offering petitioner the opportunity to explain why his new claims had been omitted from his first Section 2255 motion. Petitioner filed an explanation with the magistrate, and the magistrate considered the explanation and recommended that the district court summarily dismiss the motion without holding an evidentiary hearing. He stated that "[p]etitioner's explanation of his failure to raise [his new claim] in his previous [motion] is * * * without merit," observing that petitioner "[did] not contend he was unaware of the facts supporting his newly asserted claims or that he was unaware that those facts constituted a basis for

habeas relief" (R.E. 13). The district court adopted the magistrate's recommendation and dismissed petitioner's motion to vacate his convictions (Pet. App. 2).

The court of appeals unanimously affirmed (Pet. App. 1-3). It held that petitioner had failed to meet his burden of showing that he either "lacked knowledge of the facts underlying his instant claims or that he did not understand their legal significance" at the time he filed his first Section 2255 motion (Pet. App. 2). Since petitioner's affidavit "reflect[ed] an awareness in 1979 of the facts underlying the instant contentions and the legal significance of those facts," the court concluded that the district court correctly dismissed petitioner's motion to vacate his convictions (*id.* at 3).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Further review of petitioner's fact-bound claim is not warranted.

Rule 9(b) of the Rules Governing Section 2255 Proceedings states in pertinent part that "[a] second or successive motion [alleging new or different grounds for relief] may be dismissed if * * * the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules." When a movant raises a new ground for relief in a successive motion, he bears the burden of demonstrating either that he lacked knowledge of the facts underlying his new claim or that he did not understand the legal significance of the relevant facts. *Price* v. *Johnston*, 334 U.S. 266, 291-292 (1948); *Miller* v. *Bordenkircher*, 764 F.2d 245, 250-251 (4th Cir. 1985) (interpreting identical rule relating to actions under 28 U.S.C. 2254); *Daniels* v. *Blackburn*, 763 F.2d 705 (5th Cir. 1985) (same); *Jones* v. *Estelle*, 722 F.2d 159, 164

(5th Cir. 1983) (en banc), cert. denied, 466 U.S. 976 (1984) (same). The decision whether to deny a Section 2255 motion on the ground that the claim for relief was omitted from a prior motion rests within the sound discretion of the trial judge. See *Sanders* v. *United States*, 373 U.S. 1, 18 (1963).

The courts below correctly determined that petitioner was aware when he filed his first Section 2255 motion of the factual background and legal significance of his claim relating to the absence of an interpreter at the trial. Petitioner admitted his knowledge of these facts in the affidavit filed in the district court (Pet. App. 3). Indeed, petitioner hardly could deny knowledge of the claim since the issue had been raised in the petition for a writ of certiorari that he filed in 1978—one year before he filed his first Section 2255 motion. Petitioner claims (Pet. 10-11) that his failure to raise this issue in his first Section 2255 motion should be excused because he received poor legal advice from fellow inmates and because he has a limited ability to communicate in English. But it would have taken little linguistic ability or legal acumen simply to incorporate the argument from his petition for a writ of certiorari into the Section 2255 motion filed in 1979.

Moreover, as we noted in our first brief in opposition (78-290 Br. in Opp. 3-4), there is no reason to believe that petitioner was prejudiced because an interpreter was not present at his trial. Petitioner characterized himself as a "long-time" resident of Chicago and was able to understand and answer questions posed to him at arraignment without apparent difficulty. Petitioner's attorney did state during the sentencing proceeding that he had difficulty communicating with petitioner, but the attorney's remark may have reflected a concern about petitioner's ability to express himself fluently during the sentencing proceeding and thus

does not by itself show that petitioner was unable to understand the events at trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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